RECENT CASES

Administrative Law—

NLRB ORDER UNENFORCEABLE FOR RETROACTIVE EFFECT OF JURISDICTIONAL POLICY CHANGE

In 1947 when the NLRB as a matter of administrative policy was consistently declining jurisdiction in the building and construction industry,[1] a contractor, hiring for emergency AEC construction, followed procedures customary to the industry and executed closed shop agreements with the Local A. F. of L. affiliates.[2] Subsequently, pursuant to the agreement, he discharged an employee delinquent in his union dues. In 1948, following the passage of the Taft-Hartley Act,[3] the NLRB reversed its jurisdictional policy [4] and entertained the discharged employee's complaint. It ruled that the union contract was invalid since concluded before a contemplated expansion of the working force.[5] Accordingly the NLRB held that the agreement was not a proper basis for discharge and ordered the employee reinstated with back pay. On appeal, enforcement was denied, the court holding that the order was arbitrary [6] because the retroactive operations of the NLRB's jurisdictional policy change worked hardship upon the

1. See, *e.g.*, Johns-Manville Corp., 61 N.L.R.B. 1 (1945). See generally: Covington, *Jurisdiction of the NLRB over the Building & Construction Industry*, 28 N.C.L. REV. 1 (1949); Note, 60 YALE L.J. 673 (1951).

2. Substantially all laborers of the type required belong to the A. F. of L. At the time of the instant decision the local in question had finally been certified, instant case at 142, 151.

3. The Taft-Hartley Act provides that performing an obligation under an agreement entered into before the effective date of the Act (the situation in the instant case) is not an unfair labor practice if such performance was not an unfair labor practice under § 8(3) of the Wagner Act. 61 STAT. 152, 29 U.S.C. § 158 (Supp. 1947). Section 8(3) of the Wagner Act provided that a closed shop agreement was valid if made with a labor organization which was "the representative of employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made." 49 STAT. 452 (1935), 29 U.S.C. § 158 (1946).

4. In a speech to the Associated General Contractors on February 11, 1948, Mr. Denham, General Counsel for the NLRB, announced that the board would extend its coverage to the industry, 21 LAB. REL. MANUAL 44 (1948). The first case in which the board assumed jurisdiction was Ozark Dam Constructors, 77 N.L.R.B. 1136 (1948).

5. Guy F. Atkinson Co., 90 N.L.R.B. 143 (1950). This rule has been applied where the initial work force making an agreement is so small that it cannot be considered representative of a subsequently expanded force. Coast Pacific Lumber Co., 78 N.L.R.B. 1245, 1246 (1948); Daniel Hamm Drayage Co., 84 N.L.R.B. 458 (1949), *enforcement granted*, 185 F.2d 1020 (5th Cir. 1950) (This case is in conflict with the instant case).

6. Under the Administrative Procedure Act, unless the "agency action is by law committed to agency discretion," the reviewing court is authorized to . . . "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ."; 60 STAT. 243, 5 U.S.C. § 1009(e) (1946).

contractor out of proportion to the public ends to be accomplished. *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

Where in a prior proceeding the board had declined to assert jurisdiction, it has later from considerations of fairness refused complaints based on facts occurring before the adoption of changed jurisdictional standards.[7] The instant case, differing only in that a consistent policy replaces a specific proceeding of declining jurisdiction, raises the question whether the board may lawfully do otherwise. *SEC v. Chenery Co.*[8] is the leading case involving retroactive application of agency policy in adjudication to an undisputed fact situation. There officers of a corporation legally[9] purchased its stock during an SEC reorganization proceeding. Later the SEC, announcing a new principle, nullified this insider trading as "detrimental to the public interest."[10] The Supreme Court, giving great weight to the commission's policy judgment, affirmed the action as reasonable since it could not say that the undesirable retroactive effect outweighed the impairment to the statutory purposes in the alternative inaction.

In contrast, the court in the instant case, without purporting to limit review to the reasonable basis test, apparently substituted its judgment for that of the NLRB.[11] The court felt that on these facts its competence in deciding questions of retroactivity was at least equivalent to the board's. Some basis for this intensified judicial scrutiny may be found in *Universal Camera Co. v. NLRB*,[12] which held that the Taft-Hartley and Administrative Procedure Acts, both of which came into effect after the *Chenery* case, expressed a "legislative mood" that reviewing courts must "assume more responsibility for the reasonableness and fairness"[13] of NLRB decisions when applying the substantial evidence test to factual issues. The decision has been interpreted in the Ninth Circuit as giving the judiciary "a much broader sphere of action"[14] in deciding what NLRB orders are to be enforced. That interpretation, which tends to exaggerate the legislative mood in so far as it decreases the weight given agency decisions, is a factor weighing against the permissibility of the retroactivity in the instant case.[15]

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7. *See e.g.*, Compressed Air, 93 N.L.R.B. 274 (1951); C. A. Brookman, 94 N.L.R.B. 234 (1951); *cf.*, NLRB v. Baltimore T. Co., 140 F.2d 51 (4th Cir. 1943), (back pay limited to date of first notice of changes of policy).

8. 332 U.S. 194 (1947).

9. SEC v. Chenery Corp., 318 U.S. 80 (1942).

10. 49 STAT. 815 (1935), 15 U.S.C. §79g(2) (1946).

11. "Primarily our concern is whether this court is permitted to substitute its judgment for that of the board, and whether, if the court has a power to exercise an independent judgment, it ought to do so in this particular case." Instant case at 149.

12. 340 U.S. 474 (1951).

13. *Id.* at 490.

14. NLRB v. Red Spot Electric Co., 191 F.2d 697 (9th Cir. 1951).

15. The court stated that the APA expresses a mood against retroactivity by rendering ineffective rules and general statements of agency policy of which the public is not notified in advance of enforcement. The provision apparently concerns rules and not the instant adjudication; carrying over of the policy has limited justification. 60 STAT. 238, 5 U.S.C. 1002(a)(3) (1946).

Certain factual differences may also have been instrumental in persuading the court to substitute its judgment for the board's, instead of searching as in *Chenery* for a reasonable basis for the order. There it is probable that the insiders were aware of a risk that the commission would disapprove of their trading during reorganization.[16] Though they lost sizable expected profits and control of a valuable corporation, the success of the reorganization was at stake. The expertise of the commission commands much respect in its analysis of the economic potential in a complex corporate structure. In the present case more of the elements of equitable estoppel are present. This is not an instance of sudden enforcement of a neglected statute. The board had repeatedly declared that acceptance of jurisdiction in the industry would not advance the purposes of the act. Labor relations in the industry were based upon that rule. While board policy in other industries suggested that the union making the agreement might not be considered representative,[17] the contractor had no recourse to the NLRB to determine representative status. He was compelled by the emergency, economic exigency, and union pressure to follow the customary hiring hall procedure.[18] Another court, giving more weight to the board's concern for the laborer in light of the purposes of the Wagner Act, might possibly have held this penalizing of the employer reasonable. Though the result in the instant case may be justified on the merits, the court could better have analyzed the problem in terms of whether or not there was a reasonable basis for the board's decision, rather than speaking in terms of substituting its opinion for that of the board.

Administrative Law—

HEARING EXAMINER REGULATIONS HELD INVALID UNDER ADMINISTRATIVE PROCEDURE ACT

Regulations of the Civil Service Commission promulgated under § 11 of the Administrative Procedure Act[1] provided (1) for filling hearing examiner vacancies through promotion, transfer, appointment, or reassign-

16. DAVIS, ADMINISTRATIVE LAW 555 (1951).

17. See Sardik Food Products Corp., 46 N.L.R.B. 894 (1943). The building trades have a special problem. 11 U. OF PITT. L. REV. 103 (1949).

18. The board held that the Wagner Act did not provide for exceptions based on these factors. Guy F. Atkinson Co., 90 N.L.R.B. 143, 145, 146 (1950).

1. 60 STAT. 244 (1946), as amended, 63 STAT. 1067 (1949), 5 U.S.C. § 1010 (Supp. 1950): ". . . there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary . . . who shall be assigned to cases in rotation so far as practicable. . . . Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission. . . . Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings. . . . Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purpose of this section, the Commission is authorized to . . . promulgate rules. . . ."

ment, the employing agency having power to choose the method to be used; (2) placing hearing examiners in salary grades, with examiners in each grade rotating only through cases of a fixed level of difficulty (there was no provision as to who should classify the cases); (3) reduction in the number of examiners; and (4) conditional appointment in emergency situations.[2] A group of hearing examiners brought an action against the commission to have these regulations declared invalid on the ground that they enabled the agencies to exercise control over examiners' tenure, promotion, and compensation. The court of appeals held all but the conditional appointment provision contrary to § 11 of the Act, affirming on the opinion of the district court,[3] with one dissent. *Ramspeck v. Federal Trial Examiners Conference,* 2 PIKE & FISCHER AD. LAW 2d 602 (D.C. Cir. 1952).

The instant case represents the most recent eruption in the conflict between those who, by analogy to the judiciary, seek more independence for hearing examiners and that faction which considers administrative expertise and agency control in furtherance of statutory policies the more desirable ends.[4] The regulations here under scrutiny left room for agency control by allowing agencies to choose the method of filling vacancies and by not denominating who should apply the uncertain case-grading criteria. The rules also undermined security of tenure with the reduction in force provisions. One of the major purposes of the Administrative Procedure Act was to make hearing examiners independent of pressure from agencies whose cases they pass upon.[5] The Attorney General's Committee on Administrative Procedure recognized the importance of high salaries and independence to the calibre of hearing examiners.[6] Both congressional committees emphasized the purpose of § 11 to render hearing examiners independent of their agencies, but also suggested that the commission should classify examiners into grades based on experience and duties performed, so that examiners could specialize in cases for which they had qualified through examinations.[7]

Attempts by the Civil Service Commission to implement the Act's purpose since its passage have thus far been nugatory. The initial advisory

2. 5 CODE FED. REGS. § 34.1-15 (Cum. Supp. 1951).

3. Federal Trial Examiners Conference v. Ramspeck, 104 F. Supp. 734 (D.D.C. 1952).

4. See Feller, *Administrative Law Investigation Comes of Age,* 41 COL. L. REV. 589, 597-604 (1941); *The Federal Administrative Procedure Act: Codification or Reform?* 56 YALE L.J. 670, 691-95 (1947); Instant case, 2 PIKE & FISCHER AD. LAW 2d 602, 605 (1952).

5. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951).

6. REP. ATT'Y GEN. COMM. AD. PROC. 46 (1941).

7. SEN. DOC. No. 248, 79th Cong., 2d Sess. 215, 280-81 (1946). The Senate Judiciary Committee stated at p. 248: "The Commission would exercise its powers by classifying examiners' positions and upon customary examination through its agents, shift examiners to superior classifications or higher grades as their experience and duties may require. The Commission might consult the agency, as it now does in setting up positions or reclassifying positions, but it would act upon its own responsibility and with the objects of the bill in mind."

board, motivated largely by a desire to purge unwanted elements,[8] found 42 of 148 status incumbents disqualified and others qualified only for lower grades than they then occupied. During the ensuing deluge of appeals and protests the board's recommendations were abandoned, the board itself resigned, and almost all incumbents were given permanent appointments. The opportunity for replacement was thus lost.[9] Prior to the issuance of the present regulations, the Attorney General advised that the commission, and not the agencies, should determine the examiners to be promoted,[10] and it was protested that the regulations evaded the intent of the Act.[11] But the regulations were nevertheless issued, Commission Chairman Ramspeck stating that the rotation provision of the Act applied only to rotation of examiners on cases of the level of difficulty for which they qualified rather than consecutive rotation as the cases arose. Promotion would then be by qualification and not by seniority.[12]

The court in the instant case justifiably followed the legislative mandate in declaring these regulations invalid because of the leeway allowed for agency control of hearing examiners. But the language of the court went further and rejected any system of classification, promotion, and rotation regulations under § 11.[13] Yet the legislative history shows that Congress considered the promulgation of some such system.[14] The agencies themselves established positions of varying levels of difficulty, responsibility, and qualification requirements.[15] The invalidity of the regulations in question does not require a similar holding for a suggested solution by classification, for example, into junior and senior examiners within each agency.[16] Classification for channeling the more difficult cases to experienced examiners and simpler cases to novitiates appears desirable from a practical

8. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950). Professor Fuchs concluded that "what was wanted, consciously or unconsciously, were examiners who would be tender toward economic interests affected by regulation." *Id.* at 749 n.46.

9. DAVIS, ADMINISTRATIVE LAW § 92 (1951); Fuchs, *supra* note 8; Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950).

10. SEN. DOC. No. 82, 82d Cong., 1st Sess. 4 (1951).

11. *Id.* at 9-10.

12. *Id.* at 11-12.

13. *See*, Federal Trial Examiner's Conference v. Ramspeck, 104 F. Supp. 734 (D.D.C. 1952). The Circuit Judge dissenting spoke to this point.

14. SEN. DOC. No. 248, 79th Cong., 2d Sess. 215, 280-81 (1946); see instant case, 2 PIKE & FISCHER AD. LAW 2d 602, 604-6 (1952).

15. SEN. DOC. No. 82, 82d Cong., 1st Sess. 12 (1951).

16. "If classification is justifiable at all, then it should be on the basis of the type of work done by the agencies. And, within each agency, two grades designated 'senior examiners' and 'junior examiners' would be adequate and practical; more is unrealistic and unjustified." Letter of Senator McCarran, *id.* at 10. See also Woodall, *The Appointment and Compensation of Federal Hearing Examiners*, 10 FED. B.J. 391 (1949), in which the author, in taking the same approach as the court in the instant case, criticizes a similar earlier set of classifications for their lack of objectivity and possibility of agency control. His suggestion is identical with McCarran's since in his opinion there are only two categories of administrative cases—"simple" and "difficult."

standpoint. In any event, the final solution of the long-unsolved hearing examiner problem is yet to be put forth, and there is increasing suggestion that the Civil Service Commission may be procrastinating itself out of its position as examiner controller under § 11.[17] Possibly, therefore, the original proposal of the Attorney General's Committee, that appointment of hearing examiners be lodged in a new Office of Federal Administrative Procedure,[18] may yet emerge as an administrative solution of the hearing examiner problem. But creation of such an office would of itself only transfer to a new arena the continuing conflict between a desire for independent examiners, and for examiners responsive to agency policy in evaluating questions of fact.

Civil Rights—
DENIAL OF VOTE TO NEGROES IN PRE-PRIMARY ELECTION

The Jaybird Party of Fort Bend County, Texas, held all-white primaries for county and precinct officers, and the winners then applied for a place on the Democratic primary ballot as individuals rather than candidates of the Jaybird Party. It was admitted that endorsement by the Jaybirds usually meant that the winner would be unopposed in the Democratic primary and therefore assured of victory in the general election. Negro voters brought a suit for a declaratory judgment that they were entitled to vote in the Jaybird primaries.[1] Although the Jaybird Party's activities were clearly outside the scope of a Texas statute[2] authorizing minority political parties to hold primaries on the legal primary day and certify the winners to the general election as nominees of the party, the district court held the Jaybirds were a political party within the statute and that the Negroes had a right to vote.[3] The court of appeals reversed on the ground that the Jaybird Party was not a political party and in no way operated as part of the state election or political machinery so as to make its actions

17. As suggested alternatives see, *e.g.*, SEN. Doc. No. 82, 82d Cong., 1st Sess. 9-10 (1951) (presidential appointment procedure); Rhyne, *The Administrative Procedure Act: Five Year Review Finds Protection Eroded*, 37 A.B.A.J. 641 (1951) (vesting control of examiners in Administrative Office of United States Courts).

18. REP. ATT'Y GEN. COMM. AD. PROC. 47 (1941).

1. Plaintiffs claimed violation of U.S. CONST. AMEND. XIV, § 1 and XV, § 1; also of 16 STAT. 140 (1870), 8 U.S.C. § 31 (1946) and 17 STAT. 13 (1871), 8 U.S.C. §§ 43, 47 (1946).

2. TEX. REV. CIV. STAT. ANN., art. 3136 (1939), repealed by Tex. Acts 1951, c. 492, art. 248 (effective Jan. 1, 1952). The repeal was probably brought about by the district court's decision in the instant case, Terry v. Adams, 90 F. Supp. 595 (S.D. Tex. 1950).

3. 90 F. Supp. 595 (S.D. Tex. 1950).

subject to the Constitutional prohibitions of the Fifteenth Amendment. *Adams v. Terry*, 193 F.2d 600 (5th Cir. 1952), *petition for certiorari filed*, 21 U. S. L. WEEK 3002 (U.S. May 6, 1952).

The primary election has been the chief weapon[4] of the southern states in their battle to maintain "white supremacy" despite the provision of the Fifteenth Amendment that "The right . . . to vote shall not be denied . . . by any state on account of race, color or previous condition of servitude."[5] The decisiveness of the Democratic primary in the South has meant that, by barring the Negro from a choice of candidates at the primary, political offices would be controlled by the whites. However, much of the effectiveness of this device has been lost as a result of court action during the last two decades, and where the primary effectively controls the choice, the right to vote includes the right to vote in the primary.[6]

Recent cases have cut away much of the state action limitation of the Fifteenth Amendment. In *Smith v. Allwright*[7] discrimination by the Democratic Party in Texas was invalidated because, by regulating the primary under statutory authority, the party was acting as the agent of the state.[8] To avoid the impact of this decision, South Carolina repealed all its statutory and constitutional provisions relating to primaries. Democratic Party officials refused primary ballots to Negroes on the ground that the party was a private organization not subject to the constitutional limitations. But in *Rice v. Elmore*[9] the Court of Appeals for the Fourth Circuit held that the primaries were a part of the state's election machinery and that, in operating a state function, party members were de facto officers of the state. After this the party vested control of primaries in Democratic Clubs to which Negroes were not admitted. Again the plea of private organization failed and the court refused to let the party do indirectly what it could

4. Some direct attacks have been made on the general election itself; *e.g.*, the "grandfather clause," invalidated in Guinn v. United States, 238 U.S. 347 (1915), and unreasonable restrictions on registration, held unconstitutional in Lane v. Wilson, 307 U.S. 268 (1939). However, the literacy tests and poll tax still retain their validity in spite of attack. See Williams v. Mississippi, 170 U.S. 213 (1898), and Breedlove v. Suttles, 302 U.S. 277 (1937).

5. U.S. CONST. AMEND. XV, § 1.

6. Smith v. Allwright, 321 U.S. 649 (1944); *cf.* United States v. Classic, 313 U.S. 299 (1941).

7. 321 U.S. 649 (1944).

8. Prior to this decision discrimination had been attacked under the provision of the Fourteenth Amendment that "No state shall . . . deny to any person . . . the equal protection of the laws." Thus a Texas statute denying Negroes the right to vote in primaries was invalidated, Nixon v. Herndon, 273 U.S. 536 (1927). Next a similar provision adopted by the Democratic State Executive Committee was thrown out on the ground that the committee's authority to regulate the qualifications of voters was statutory, Nixon v. Condon, 286 U.S. 73 (1932). However, in Grovey v. Townsend, 295 U.S. 45 (1935), the Court refused to extend this concept of state action to a resolution of the Texas Democratic State Convention, holding that theirs was party action voluntary in character. This case was expressly overruled by Smith v. Allwright, *supra* note 6.

9. 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875, 61 HARV. L. REV. 1247 (1948).

not do directly, holding that the state cannot avoid constitutional provisions by allowing a party to take over its electoral machinery.[10] The rationale of these decisions was extended in *Perry v. Cyphers*[11] to local primaries where Negroes were excluded by a county party organized under the Texas statute involved in the instant case.

These cases, particularly *Rice v. Elmore,* indicate that the controlling factor is not the nature of the organization practicing the exclusion but rather that elections are a state function from which the state cannot divorce itself. Thus the constitutional prohibitions of the Fifteenth Amendment have been applied despite the private nature of the organizations involved and an absence of state action in anything more than a fictional sense. Applying this analysis to the instant case, even though the Jaybirds are unconnected with the state and conform to none of Texas' statutory requirements, the Jaybird elections perform a state function because they control the result of the primary election. The only distinguishing feature from *Rice v. Elmore* is that here the private discriminatory practices are one step further removed from the general elections. Yet the Jaybird pre-primaries as effectively control the ultimate election choice as did the primaries which were in issue in the earlier cases. If the courts are going to continue to look at the result of the election process and require the right to participate at the level where the actual choice is made, the fact that this level is pre-primary rather than primary should be immaterial.

Drawing a line between "private" elections which perform a state function and those which are mere political endorsements of candidates by private organizations may prove to be difficult.[12] But the danger of possible encroachment on political activities by organizations with membership restrictions is minimal because the type of social situation which makes possible effective use of the Jaybird technique would appear to be limited to Southern efforts to maintain white supremacy.

By concluding that the Jaybirds are private and that therefore there is no state action, instead of applying the state function test of *Rice v. Elmore,* the instant decision has opened a way to turn the primary election into an empty form manipulated by the all-white pre-primary. This undermines the cases which by enforcing non-discriminatory primaries have partially opened the door to Negro suffrage in the South.

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10. Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949), 19 U. OF CIN. L. REV. 155 (1950).

11. 186 F.2d 608 (5th Cir. 1951).

12. An example might be where the major white social and business organizations of a Southern county would separately vote on the same slate of pre-primary candidates, and then endorse the candidate with the largest total number of votes, who would proceed to enter the primary as an individual. This would be effective only if the candidates defeated in the endorsement election were willing to abide by the results of that choice and not make another fight in the primary, and to the extent that the endorsement elections did not embrace all the white electorate this would be difficult to achieve.

Conflict of Laws—
RECOVERY OF ATTORNEY'S FEES IN SUIT ON FOREIGN INSURANCE CONTRACT

Appellant sought recovery of reasonable attorney's fees under a Florida statute providing for such recovery upon the rendition of a judgment by any Florida court against an insurer and in favor of a beneficiary under any contract of insurance.[1] The contracts involved were executed in New York where no such statute is in effect. The insured, having subsequently moved to Florida and paid premiums there, brought suit in the Florida courts. On appeal from a denial of attorney's fees in a judgment for the insured, the Florida Supreme Court held that the insured was entitled to the fees because the Florida statute was procedural in its application and applicable to any suit in Florida, regardless of where the insurance contract was made. The court spoke of the award of attorney's fees as a penalty but treated it as a matter of procedure because the statute was expressly limited to Florida courts. *Feller v. Equitable Life Assurance Society of the United States,* 57 So.2d 581 (Fla. 1952).

Had the court found the award of attorney's fees a substantive matter it would probably have denied them.[2] But where the practical convenience in adopting the local law is great, and the effect of so doing on the rights of the parties is negligible, the law of the forum may control.[3] This conclusion is expressed in the rule that procedural matters are governed by the law of the forum, and substantive matters by the foreign law.[4] The crucial decision which is all too rarely explained is the initial classification as substantive or procedural.[5]

Penalty statutes such as Florida's [6] are designed to discourage insurers from forcing meritorious claims to disadvantageous settlements by

1. FLA. STAT. § 625.08 (1949). "Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be adjudged or decreed against such insurer, and in favor of the beneficiary named in said policy or contract of insurance, a reasonable sum as fees or compensation for his attorneys or solicitors prosecuting the suit in which the recovery is had." The statute was held not a violation of the state constitution's equal protection clause, but a reasonable police regulation of business affected with a public interest. United States Fire Ins. Co. v. Dickerson, 82 Fla. 442, 90 So. 613 (1921).

2. Florida apparently adopts the conflicts rule that matters of substance are governed by the law of the place of contract. 2 BEALE, CONFLICT OF LAWS § 332.18 (1935). The instant decision suggests that the Florida statute would be substantive as to local contracts.

3. RESTATEMENT, CONFLICT OF LAWS c. 12, Introductory Note (1934); 3 BEALE, *op. cit. supra* note 2, § 584.1.

4. GOODRICH, CONFLICT OF LAWS § 80 (3d ed. 1949).

5. 3 BEALE, *op. cit. supra* note 2, § 584.1. See also Ailes, *Substance and Procedure in the Conflict of Laws,* 39 MICH. L. REV. 392 (1941).

6. *E.g.,* ARK. STAT. ANN. § 66-514 (1947) (12% damages plus attorney's fees); KAN. GEN. STAT. ANN. § 40-256 (Corrick 1949) (reasonable attorney's fees); NEB. REV. STAT. § 44-359 (1934) (reasonable attorney's fees); ORE. COMP. LAWS ANN. tit. 101, § 101-134 (1940) (reasonable attorney's fees); TEX. REV. CIVIL STAT. ANN. INSURANCE CODE § 3.62 (1951) (12% damages plus attorney's fees).

the cost and delay of litigation. As to all but Florida residents and claimants suing in Florida, an insurance company can avoid the Florida statute by bringing an action for declaratory judgment on the disputed claim in a different state. But an insurance company contesting a claim in good faith in a Florida court cannot now escape attorney's fees should it lose.[7] This penalty for an unsuccessful contest, especially in light of possible jury prejudice against the insurer, may substantially increase the number of claims paid, as well as the amount paid on each claim unsuccessfully defended. In the Federal Rules somewhat analogous provisions require the payment of reasonable expense of proof, including attorney's fees, where the denial of a requested admission is not justified at trial; [8] but these differ from the insurance statutes in that a party may plead ignorance of the facts, and more significantly in that they apply equally to both parties. In contrast an insurance company can never recover its attorney's fees under the instant statute, but may be compelled to pay substantial sums.

These penalty statutes have troubled courts before in conflict of laws situations.[9] In the present case, the court relies on *Fidelity-Phenix Fire Insurance Co. v. Cortez Cigar Co.*,[10] in which suit was brought in Georgia on a fire insurance policy issued in Florida and covering Florida property. The plaintiff sought attorney's fees under the Florida statute, but the court held that attorney's fees would not be allowed since the statute was a procedural one limited to the courts of Florida.[11] That case involved the applicability of the law of the place of contract to a suit in a foreign forum, rather than the applicability of the forum's law to a foreign contract. To that extent the fact situation in the instant case seems to be more nearly

7. Where there is diversity of citizenship, which will frequently be the case when a Florida resident is claimant, the insurance company may possibly escape the impact of this "procedural" rule by removing to a federal court. If that is so the characterization of the rule as procedural in an attempt to extend its applicability may prove self-defeating. It is probable, however, that a federal court would make its own characterization. *Cf.* Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940); Orlando Candy Co. v. New Hampshire Fire Ins. Co., 51 F.2d 392 (D.C. Cir. 1931).

8. See Fed. R. Civ. P. 37(c): "If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the orders shall be made." See also, *e.g.*, N.Y.C.P.A. Art. 32, § 322(3).

9. Arkansas statute held substantive in New York Life Ins. Co. v. Miller, 139 F.2d 657 (8th Cir. 1944); Kansas statute held substantive in Prudential Ins. Co. of America v. Carlson, 126 F.2d 607 (10th Cir. 1942); Nebraska statute held substantive in Mutual Ben. Health & Accident Ass'n v. Bowman, 96 F.2d 7 (8th Cir. 1938); Oregon statute held procedural in Horwitz v. New York Life Ins. Co., 80 F.2d 295 (9th Cir. 1935); Texas statute held substantive in Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924).

10. 92 F.2d 882 (5th Cir.), *cert. denied*, 303 U.S. 636 (1937).

11. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), suggests that the Federal Court sitting in Georgia would not be required by the full faith and credit clause to give effect to the Florida statute even if it were regarded as conferring a substantive right.

that of *Aetna Life Insurance Co. v. Dunken*.[12] The Supreme Court there held that the application of the Texas penalty statute to a contract governed by the law of Tennessee constituted a violation of the due process and full faith and credit clauses of the United States Constitution. The fact that the claimant had, while a resident of Texas, converted his policy from term insurance to endowment was not enough to warrant the application of the Texas statute. Thus, due process may be violated when the forum has insufficient contacts with the insurance contract to justify application of its own statute.

Aetna is perhaps distinguishable from the instant case because of the greater commercial impact of the Texas statute, which allows a 12% penalty in addition to attorney's fees. A statute so substantially affecting the risk assumed by a foreign insurer seems clearly of a substantive nature. The greater similarity of the Florida statute to the rule penalizing unjustified denial of a requested admission argues that the statute is procedural in character. Yet the Florida statute appears to have the same purpose and to be accomplishing the same interference with foreign contracts declared unconstitutional in *Aetna*. This would indicate that the allowance of attorney's fees is a substantive right conferred on the insured and not merely a procedural incident of the judgment. It is therefore highly questionable whether Florida has satisfied the requirements of governmental interest necessary to apply its own statute to an insurance contract made in a foreign state.[13]

Copyrights—
PUBLISHER'S RIGHTS IN TYPOGRAPHY AFTER EXPIRATION OF BOOK COPYRIGHT

Plaintiff copyrighted and published a book containing the libretto and score of the opera "Falstaff" in 1893. On the expiration of the copyright defendant, after making minor changes and inserting an English translation, photographed the pages of the book and published his own edition by a process of offset lithography. Plaintiff brought a bill in federal district court seeking to enjoin the sale of defendant's practically identical copy on the grounds that the typography was not dedicated along with the work at

12. 266 U.S. 389 (1924), decided under TEX. STAT., REV. CIV. art. 4746 (1911), which provides: "In all cases where a loss occurs and the life (health or accident company) . . . liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holders of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss."

13. See CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS §§ 19, 20 (1942).

the time of copyrighting, and that defendant's act constituted unfair competition under the laws of New York. The trial court denied a preliminary injunction. In affirming, the circuit court of appeals ruled that the issue of common law unfair competition was excluded, since the definition of the rights remaining in plaintiff after the publication of the book under a copyright notice constituted a federal question. On this the court held that the effect of a claim of copyright over the whole work was to dedicate to the public at the close of the statutory period the work in all its aspects and that the typography, whether or not itself copyrighted or copyrightable, was included within this dedication.[1] A contrary holding, the court reasoned, would permit a "secret" limitation to defeat the public's expectation that it had an unlimited right to copy and publish expired works. *G. Ricordi & Co. v. Haendler,* 194 F.2d 914 (2d Cir. 1952).

This is a case of first impression to the extent that a publisher has attempted to retain some property rights in the format, as distinguished from the literary content, of a copyrighted work after the expiration of the statutory period of protection.[2] In cases of non-copyrighted and non-copyrightable works the theory of unfair competition espoused by plaintiff has been useful to publishers when they could show that the public had attached some secondary meaning to the particular design or appearance of the work. Thus exact reproduction has been forbidden where an elaborately illustrated Christmas hymn book had become identified with a particular publishing house[3] and where the cartoon characters "Mutt and Jeff" had become known to the public as the productions of a certain artist.[4] But relief generally has been denied in the absence of a finding that the public is being misled.[5] The court in the instant case eliminates any possibility that a similar protection will be available to those whose copyrights have expired, by including the design and appearance of the work within the statutory dedication. Such an inclusion limits the publisher's protection at the end of the period to an action for "passing off" against those who would appropriate the name as well as the contents of the expired work without clearly indicating the name of the actual pub-

1. The court expressed no opinion on the effect of publication under a copyright in which the publisher's rights in the typography were specifically reserved. Instant case at 915. That question in any event is unlikely to arise until copyrights subsequent to this decision expire.

2. The maximum period for which a work may be protected under the Copyright Act is 56 years. 17 U.S.C. §§ 24, 25 (Supp. 1952).

3. Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N.Y. Supp. 309 (1st Dep't 1907).

4. Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133 (1921).

5. *E.g.,* National Pub. Co. v. John A. Hertel Co., 105 F.2d 222 (7th Cir. 1939); Keystone Type Foundry v. Portland Pub. Co., 186 Fed. 690 (1st Cir. 1911); Hebrew Pub. Co. v. Scharfstein, 288 N.Y. 374, 43 N.E.2d 449 (1942). Another court has gone so far as to declare that the only way to compete with picture post cards is to reproduce them and that in the absence of a copyright the original publisher has no protection. Bamforth v. Douglass Post Card & Mach. Co., 158 Fed. 355 (C.C.E.D. Pa. 1908).

lisher.[6] Otherwise the dedication is complete and the public's right to copy is unlimited.[7]

The underlying policy of this decision seems to be that of preventing the establishment of perpetual monopolies in literary and artistic works when the legislature has by statute declared a limit.[8] In order to promote the advancement of the useful arts and also assure eventual widespread distribution, Congress gives to an author exclusive rights to his works for a limited time,[9] but exacts as a price complete dedication at the close of the period. In cases of works requiring any considerable amount of engraving the effect of this dedication would be nullified by a holding that the typography can be protected, after the copyright has expired, by a common law action of unfair competition. The high original cost of engraving[10] would preclude other publishers from competing with one who has had fifty-six years in which to amortize his investment and exploit the market.[11] If the policy of this decision be to prevent this practical monopoly, the court appears justified in denying common law relief to effectuate it. In the absence of this policy argument the decision may be supported on the more general ground that the Copyright Act, for its duration, protects a publisher from reproduction of his work in any manner.[12] An implication from this is that when the Act's protection ends others may reproduce the work by utilizing the common copying methods. The result obtained in the instant case may be compared to the preclusion of state action under the patent law where "The nature and extent of the legal consequences on the expiration of a patent are federal questions, the answers to which are to be derived from the patent laws and the policies they adopt."[13] There is no compelling reason why the result should be different in the field of copyrights.

6. For cases discussing this protection see G. & C. Merriam Co. v. Ogilvie, 159 Fed. 638 (1st Cir. 1908); Black v. Ehrich, 44 Fed. 793 (C.C.S.D. N.Y. 1891) (relief denied). In the instant case no element of "passing off" was present [Transcript of Record, pp. 28, 33, 34].

7. *E.g.*, G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469, 471 (2d Cir. 1951); Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398, 403 (8th Cir.), *appeal dismissed*, 231 U.S. 348 (1913); Merriam v. Holloway Pub. Co., 43 Fed. 450, 451 (C.C.E.D. Mo. 1890); Tams-Witmark Music Library v. New Opera Co., 298 N.Y. 163, 172, 81 N.E.2d 70, 74 (1948).

8. See discussion in Merriam v. Holloway Pub. Co., 43 Fed. 450, 451 (C.C.E.D. Mo. 1890).

9. See note 2 *supra*.

10. Estimates as to the increased cost of reproducing the work in the instant case by methods other than photography ranged from five times for a pen and ink production to 10 times for new engravings [Transcript of Record, p. 19].

11. It appears unlikely that a case not involving this consideration of high original cost will arise since a publisher will be reluctant to bear the expense of litigation unless there is an opportunity of securing thereby a substantial economic advantage.

12. 17 U.S.C. § 1 (Supp. 1952).

13. Scott Paper Co. v. Marcalus Co., 326 U.S. 249, 255 (1945).

Corporations—
PENSION TO WIFE OF DECEASED CORPORATE PRESIDENT HELD ULTRA VIRES

Plaintiff, a minority stockholder,[1] brought a bill in equity to enjoin payments by the defendant corporation, pursuant to a resolution of the board of directors, to the widow of its former president "in recognition of the long and valuable services . . . rendered . . . by her deceased husband." The payments were equal to the salary received by the deceased and were to continue until further notice. The court enjoined further payment and ordered the widow to return the amounts already paid her, holding that the payments were a gift and hence ultra vires. *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A.2d 295 (1952).

Attacks by minority stockholders[2] on corporate payments to retiring employees or their widows generally proceed on the ground relied on by the court in the instant case.[3] Where a formal pension plan, covering all or designated classes of employees, is in effect, corporate power to make payments pursuant thereto is now generally recognized whether the plan accords benefits related only to future services or allows credits based on past service as well. In the former case payment is sustained on the basis that it represents deferred compensation to the employee as one of the terms of his contract of employment under which he consented to work and has been induced to remain.[4] As such it is clearly within the traditional power of the corporation to set wages and terms of employment.[5] In the latter situation, corporate power is grounded on the fact that the plan, although apparently charitable and humanitarian, ultimately redounds to the business advantage of the corporation by promoting employee goodwill and loyalty,[6] while a plan that did not take into account past service would leave the older employees disgruntled.[7] Absent a formal pension plan, the

1. As to whether approval by a majority of the stockholders is necessary to the installation of a pension system or the payment of an individual pension, see O'Neal, *Stockholder Attacks on Corporate Pension Systems*, 2 VAND. L. REV. 351, 374, 375 (1949) (the law is uncertain and stockholder approval should be obtained as a precautionary measure); Note, 24 TEMP. L.Q. 79 (1950) (stockholder approval not necessary). The absence of stockholder approval of the resolution in the instant case was not accorded any significance in the opinion.

2. Pension cases involving suits by minority stockholders to enjoin payment should be distinguished from cases where the retired employee is suing to enforce payment. Although the corporation's promise to pay may be unenforcible for lack of legal consideration, it may nevertheless be impregnable against attacks by minority stockholders. *Compare* Shear Co. v. Harrington, 266 S.W. 554 (Tex. Civ. App. 1924), *with* Henderson v. Bank of Australasia, 40 Ch. D. 170 (1888).

3. O'Neal, *supra* note 1, at 353.

4. Nemser v. Aviation Corporation, 47 F. Supp. 515 (D. Del. 1942); *In re* Wood's Estate, 299 Mich. 635, 1 N.W.2d 19 (1941).

5. BALLANTINE, CORPORATIONS § 42 (2d ed. 1946).

6. Heinz v. National Bank of Commerce, 237 Fed. 942 (8th Cir. 1916); *see* Gilbert v. Norfolk & W. Ry., 114 W. Va. 344, 347, 171 S.E. 814, 815 (1933).

7. *See* Osborne v. United Gas Improvements Co., 354 Pa. 57, 63, 46 A.2d 208, 211 (1946).

power of a corporation to make payments to an individual employee on his retirement or to his widow on his death is not so well defined. Such pensions fall short of formal plans in promoting goodwill and loyalty among employees [8] and, to the extent that they do, are not supported by the rationale sustaining formal plans. Further, courts are suspicious that the discretion involved in man-by-man pensioning may be exercised for motives not in the corporate interest. Accordingly a pension to a minor employee will be viewed more sympathetically than one to a high executive,[9] since the former is more likely free of ulterior motive. The size of the pension must bear a reasonable relation to the service rendered by the recipient and be compatible with the financial condition of the corporation.[10] Finally, the presence of motives foreign to the promotion of employee loyalty and goodwill will militate against the validity of the pension.[11]

Gauged by these factors, the decision in the instant case appears to be justified. Not only had decedent been president of the corporation, but he was also majority stockholder and his stock was being voted by his executor-bank, one of whose officers was on the board of directors of defendant corporation.[12] Further, it appeared that the main reason the payment was voted was to placate decedent's family while it was being decided how to resolve the friction between decedent's son (also a member of the board) and two older, more experienced executives over the office of president of the corporation.[13] The opinion, however, is couched in general terms [14] and may give concern to corporate counsel as to the legality of any discretionary pensions despite a Pennsylvania statute, ignored by the court,

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8. O'Neal, *supra* note 1 at 358.

9. *Compare* Cyclists' Touring Club v. Hopkinson, 1 Ch. 179 (1910), *with* Alexander v. Equitable Life Assurance Society, 233 N.Y. 300, 135 N.E. 509 (1922).

10. Alexander v. Equitable Life Assurance Society, *supra* note 9; See also Fogelson v. American Woolen Co. Inc., 170 F.2d 660 (2d Cir. 1948) (the same holding with respect to formal pension plans).

11. The courts are not usually explicit in ascribing an ulterior motive to the corporation as the reason for voiding the pension even though this may be the decisive factor. See, *e.g.*, Beers v. The New York Life Insurance Co., 73 N.Y. Sup. Ct. (66 Hun.) 75 (1892) where, following an investigation disclosing gross mismanagement of the corporation, the president retired and was immediately voted a large lifetime pension by the board of directors. While the court disallowed the pension on grounds other than that it was merely a device to induce the president to retire without a struggle, it sets out the above facts at length in the opinion. This decision and another voiding a pension, Alexander v. Equitable Life Assurance Society, 233 N.Y. 300, 135 N.E. 509 (1922), have been attributed to the life insurance scandals which occurred at the turn of the century. See WASHINGTON AND ROTHSCHILD, COMPENSATING THE CORPORATE EXECUTIVE 200 (1951).

12. Instant case at 173-4, 87 A.2d at 296.

13. Brief for appellants, pp. 6-10. The court took notice of these facts in the opinion at 179, 180, 87 A.2d at 299.

14. ". . . it is still the law of Pennsylvania that it is ultra vires and illegal for a corporation (unless authorized by statute) to give away, dissipate, waste or divert the corporate assets even though the objective be worthy." Instant case at 177, 87 A.2d at 298 (1952).

empowering corporations to grant pensions to officers and employees.[15] The decision should be limited to factual situations, where, as here, there is an abuse of discretion by the board of directors. Otherwise it may stand in the way of a future legitimate use of a discretionary pension by a corporation unable to assume the fixed financial burden of funding an overall pension plan.[16]

Interstate Commerce— POWER OF ICC TO LIMIT CARRIERS' RIGHT TO ADD TO EQUIPMENT BY LEASE

The American Trucking Associations and various certificated motor carriers brought suit in two separate actions to enjoin the enforcement of an order of the ICC prescribing a new set of regulations to control the practice of leasing and interchanging of vehicles. The regulations complained of, in substance, provide: (1) that any lease of a vehicle with a driver must be for a minimum period of thirty days;[1] (2) that compensation for such lease shall not be computed on the basis of any division of the revenue earned by the leased equipment;[2] and (3) that interchanging of vehicles is to be permitted only where operating authority is held by both parties and each carrier assigns its own driver to operate the vehicle interchanged.[3] The commission contended that the authority to issue these rules is derived from the broad powers conferred upon it in the "national transportation policy"[4] and the specific power in §§ 202 (a)[5] and 203

15. PA. STAT. ANN. tit. 15, § 2852-316 (1938): "Every business corporation may grant allowances or pensions out of the earnings of the corporation to its directors, officers, or employees, for faithful and long-continued service, who have in such service, become old, infirm or disabled." While the statute does not mention widows of officers who have died in the service of the corporation, there is no discernible reason why it should not be construed to permit pensions to such persons. It would seem to be essential in the case of formal pension plans to permit payment to widows where an employee, qualified to receive a pension, died before retiring. The statute was cited to the court in the instant case, but was not discussed in the opinion.

16. Many cases of legitimate discretionary pensions may be safely handled by a contract, promising a pension to the employee or his wife in consideration of his remaining in the service of the corporation. *In re* Wood's Estate, 299 Mich. 635, 1 N.W.2d 19 (1941); Langen v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 571 (1932), *rev'd on other grounds,* 318 Pa. 490, 178 Atl. 490 (1935).

1. 49 CODE FED. REGS. § 207.4(a)(3) (Supp. 1951).
2. 49 CODE FED. REGS. § 207.4(a)(5) (Supp. 1951).
3. 49 CODE FED. REGS. § 207.5 (Supp. 1951).
4. 54 STAT. 899 (1940), 49 U.S.C. notes preceding cc. 1, 8, 12, and 13 (1946). "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among carriers; to encourage . . . reasonable charges . . . all to the end of developing, coordinating, and preserving a national transportation system. . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."
5. 49 STAT. 543 (1935), as amended, 49 U.S.C. 302(a) (1946).

(a) (19) [6] of the Motor Carrier Act of 1935. Section 202 (a) is a statement of the general application of the Act and states that the regulation of the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce "and of the procurement thereof, and the provision of facilities therefore is vested in the Interstate Commerce Commission." Section 203 (a) defines the terms used in the chapter, and paragraph (19) states that "the 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership . . ." The Teamster's Union, substantially all of the Class I railroads of the United States, and a number of certificated carriers appeared in support of the commission's position. The plaintiffs, on the other hand, contended that the regulations of the commission are prohibited by § 208 (a) which bars it from imposing upon certificated motor carriers any restrictions preventing them from adding to their equipment "as the development of the business and the demands of the public shall require." [7] The Secretary of Agriculture, various shipping groups, and various agricultural interests were granted leave to intervene in support of plaintiffs' position. Both three-judge district courts held that the commission was acting within the scope of its authority under the Interstate Commerce Act on the ground that the proviso should be read "quantitatively" and by such a reading found that "these rules are not the equivalent of a restriction on the addition of more vehicles . . ." *American Trucking Ass'ns, Inc. v. United States,* 101 F. Supp. 710 (N.D. Ala. 1951), *probable jurisdiction noted,* 72 S. Ct. 763 (1952); *Eastern Motor Express v. United States,* 103 F. Supp. 694 (S.D. Ind.), *probable jurisdiction noted,* 72 S. Ct. 1043 (1952).[8]

The basic legal issue involves the gradual modification and dilution of the restrictive effect of the proviso contained in § 208 (a). The commission's early interpretation, enunciated in *Pittsburgh-Weirton Bus Co., Common Carrier Application,*[9] was that the proviso was a limitation upon its power to restrict the "service" of the carrier. In *Sullivan County Highway Lines, Inc., Common Carrier Application,*[10] the commission held that it could not restrict the carrier's right to add to its equipment provided that such additions did not change the kind of service being rendered, and that using buses in lieu of sedans did not necessarily change the kind of service being rendered. Later the commission reversed itself, holding that it had authority to restrict the type of service to be rendered and the type

6. 49 STAT. 544 (1935), as amended 49 U.S.C. 303(a) (1946).

7. 49 STAT. 552 (1935), 49 U.S.C. 308(a) (1946).

8. The Secretary of Agriculture has also filed an appeal in this case and probable jurisdiction was noted in 72 S. Ct. 1042 (1952).

9. 10 M.C.C. 266 (1938). ". . . This prohibition protects the right of the carrier to expand not only its 'equipment' but its 'facilities' . . . It follows that 'terms, conditions, or limitations,' in the certificate restricting the service of the carrier would be wholly inconsistent with this proviso."

10. 21 M.C.S. 717, 723 (1940); *accord,* Nudelman Common Carrier Application, 22 M.C.C. 275, 280 (1940).

of equipment used in rendering that service.[11] The rationale was that any qualitative changes in the "business" resulting from changes in the equipment could be prohibited and restricted because the proviso is only a limitation upon them from imposing quantitative restrictions within the same "business." The Supreme Court adopted the commission's modified interpretation,[12] stating that the proviso is a "prohibition against a limitation on the addition of more vehicles of the authorized type, not a prohibition of the specification of the type." [13] In the instant cases the commission and the courts have held that leasing and interchanging is *not* a quantitative restriction, even though the equipment leased or interchanged is not different from that previously used in the "business," because the carriers may still add to their equipment, and, therefore, the rules are "not the equivalent of a limitation on the addition of more vehicles." [14]

The significance of the instant decisions cannot be fully appreciated by an examination of the legal aspects alone. In 1947, the Bureau of Motor Carriers found, by questionnaires to the 19,001 carriers subject to the commission's regulations, that in that year leasing was practiced by 5,592 carriers of all types, and 4,047 (over 21% of the total carriers) regarded leasing as important.[15] Of those carriers who considered leasing important, the bureau found that they "utilized their lease equipment under 38,785 long-term leases, 104,539 round-trip leases, and 394,896 one-way trip leases." Of the 1,432 carriers using one-way trip leases, slightly more than half used no other basis. One-way trip leases comprised over 52% of all leases between carriers and owner-operators.[16] The practical effect of these decisions would be to abolish the trip lease and greatly reduce the round-trip leases in the motor carrier industry, to the serious detriment of the large segment of the certificated carriers employing those devices, and also to the detriment of the exempted carriers and the shipping public. The principal beneficiaries of these decisions would be the large, well-financed certificated carriers who do not practice leasing and, indirectly, the railroads.

The commission justifies its action on the basis of findings by the Bureau of Motor Carriers that the percent of leased vehicles in violation of commission regulations—especially safety regulations—exceed the vio-

11. Nudelman Common Carrier Application, 28 M.C.C. 91 (1941) and cases cited therein. See Commissioner Lee's dissent in Nudelman case to the effect that the ICC did not have the authority to limit the carrier to any particular type of vehicle.

12. Crescent Express Lines v. United States, 320 U.S. 401, 408 (1943).

13. *Id.* at 409.

14. American Trucking Ass'ns, Inc. v. United States, 101 F. Supp. 710, 723 (N.D. Ala. 1951).

15. Evidence introduced by the Bureau of Motor Carriers in *Ex Parte* No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, 51 M.C.C. 461, 469 (1950).

16. *Ibid.*

lation percentage of owned vehicles;[17] that the use of leased vehicles in any important degree "distorts" a carrier's operating ratio;[18] that the use of leased equipment leads to violations of operating rights and unlawful transportation by the owner-operators;[19] and generally leads to a breakdown of control and regulation.[20] In regard to these findings it should be noted, however, that the commission has already formulated rules and regulations for the control of leasing. Commissioner Eastman, concurring in *Dixie Ohio Exp. Co., Common Carrier Application,*[21] stated that the controlling principles under which a carrier may conduct the whole or any part of its operation by leasing equipment should be that the carrier "have the right to direct and control the operation of the [leased] vehicle at all times and be fully responsible therefore in all respects under all applicable provisions of law governing the duties and obligations of the carrier to the shipper and to the public generally."[22] It should also be noted that § 203 (b) states that exempted carriers, although otherwise exempted from the Act, are subject to the provisions of safety as to hours of service and safety of operation and equipment.[23] The earlier failure of the commission with its ample authority to control the violations in safety regulations by both certificated and non-certificated carriers[24] does not indicate a likelihood of much greater success under the present regulations. That there may be a need to exercise additional safety control over the exempted and the itinerant truckers[25] was granted,[26] but it is a drastic solution which adopts

17. *Id.* at 470. The chart presented by the Bureau of Motor Carriers showed that the difference in the percentage of violations between owned and leased vehicles is slight.

18. *Id.* at 471. A carrier's operating ratio is determined by dividing the gross income into the gross expense. By the use of the emotive word "distorts" the commission means only that the use of leased vehicles decreases expenses and produces a lower operating ratio. The language choice suggests that this is undesirable, though in fact it may benefit both the carrier and the consumer.

19. *Id.* at 512.

20. *Id.* at 513. "We conclude that violations of this Commission's safety rules and of the Act considered herein are largely due to the lack of reasonable regulations which would require assumption of legal responsibility on the part of authorized carriers, and proper control over the operation of leased equipment, particularly equipment accompanied by drivers. . . . The important fact developed in this investigation is that the present unregulated practices permit and facilitate violations. It is our duty to take steps to eliminate opportunities for these violations so far as possible."

21. 17 M.C.C. 735 (1939).

22. *Id.* at 752.

23. See note 6 *supra.*

24. See note 17 *supra.*

25. The term exempted trucker refers to those truckers exempted from Interstate Commerce Commission regulations under § 203(b)(6) of the Motor Carrier Act, whereas, the term itinerant truckers refers to those truckers who individually own their trucks and who hire themselves and the truck to certificated carriers, shippers, etc., and in fact have no standing under the Act at all.

26. It was generally agreed by all parties that the exempted and the itinerant truckers should be controlled under some regulations and requirements. See note 18 *supra.*

limitations and restrictions upon the certificated motor carriers whereby the one-way trip lease is abolished.[27]

The legislative history[28] and the language of the proviso clearly indicates Congress' intention that § 208 (a) should not be used to stifle the natural growth of the motor carrier industry within the routes and territory specified in the certificate. The interpretation given the proviso by the commission and the district courts has, in effect, nullified this congressional intent and has sanctioned a method whereby the commission can restrict the temporary expansion of a carrier's business. If this interpretation is accepted, it is difficult to find any limit to the commission's power to restrict the method by which carriers add to their equipment.

In view of the important role the trip lease and the owner-operator have played in the development of the motor carrier industry,[29] their elimination does not appear to be in the best interest of the public. The economic effect of the present regulations upon motor carriers, both certificated and exempted, can only lead to higher rates to the public through the uneconomical operation of one-way pay loads rather than round trip pay loads.[30] One-way trip leases have given the certificated motor carrier a degree of flexibility which has placed it on a competitive basis with other

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27. *Cf.* Local Cartage Agreement Case, C.A.B., Order No. E-6485 (1952), where the CAB, recognizing the importance of round trip trucking operations in connection with air freight pick-up and delivery and emphasizing "balanced operations," invalidated agreements which had the effect of limiting local independent truckers to one-way pay-load trips.

28. 79 *Cong. Rec.* 5654 (1935). Statement of Senator Wheeler, Chairman, Senate Committee on Interstate and Foreign Commerce. ". . . In order to meet criticisms that the effect of these provisions [§ 208(a)] would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended § 208(a) . . . by adding a proviso which permits operators to add to their equipment and facilities as business conditions may require, provided they do not go beyond the route or routes or outside the territory specified in the certificate. There was objection to the provision as it came in by a great many, so the committee amended it to meet the objection."

29. Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951). Commissioner Lee, concurring in part, stated: ". . . In the development of motor-carrier service over the years, owner-operators have played an important part and have served a useful function. They have provided, and they still provide, a pool of motor-vehicle equipment without which motor-carrier service frequently would fail to meet peak-period demands of the public. It appears from the evidence of record that the majority of the owner-operators and authorized carriers which utilize owner-operators are not guilty of the abuses which the prescribed rules are designed to eliminate."

30. Because of the unbalanced traffic conditions existing in almost all areas, *i.e.*, manufactured goods moving to rural areas and agricultural products to urban areas, the certificated carriers would tend to have pay load trips to the rural areas but less than pay load trips from those areas, and vice versa for the exempted carriers. The more economical practice would be to have one truck operate both trips with pay loads, which is what the trip lease device permits. See the statement of the court in Clarke v. United States, 101 F. Supp. 587, 591 (D.D.C. 1951), to the effect that ". . . If economies in operation are possible the public interest requires such economies. The public interest is not only in efficient service but is also in reasonable rates for that service. . . ."

modes of transportation.[31] The exempted motor carrier may be forced into a "black-market" in order to remain in business under the present regulations, because the temptation to obtain an unauthorized load to return to its home base with at least "expense-money" will be too great to resist. For these reasons it appears that the ICC, faced with a difficult problem of regulation, has come forward with a solution of dubious legal validity and which is economically and administratively unsound.

Municipal Utilities—
RATE DISCRIMINATION IN SALE OF WATER SERVICE TO NON-RESIDENTS

The City of Texarkana, Texas, purchased and operated a water and sewer service company which served both residents of the city and adjacent non-residents. At the time that the city purchased the company residents and non-residents were charged identical rates.

After two years the city elected to increase rates to non-residents [1] and non-resident customers filed suit to enjoin the increase without a concurrent increase in rates to residents. The Supreme Court of Texas, affirming (5-4) the judgment of the lower court, held that a municipally owned corporation, having elected to serve non-residents, may not do so on a discriminatory basis. *City of Texarkana v. Wiggins,* 246 S.W.2d 622 (Texas 1952).

The majority rested its holding upon the common law rule that a public utility may not discriminate in charges or service between persons similarly situated.[2] This is the rule as generally applied to privately owned public utilities. But where a municipally owned utility is concerned, as in the instant case, the heavy majority of cases have held that the municipality, in the absence of any legislative limitation, may make a discrimination as to rates based solely on the political boundaries of the municipality.[3] The basis for the distinction between private and municipally owned utility cor-

31. Keeshin Transcon. Frt. Lines, Inc.—Control, 5 M.C.C. 25 (1937). ". . . An important reason for the success which motor trucks have often had in competing with the railroads for various types of traffic has been the great flexibility of motor-truck service and its ability to adjust itself readily to the special needs of the shipper. . . ."

1. Increase in rates was by a city ordinance. Texas statutes authorized municipalities to establish rates for all public service corporations in this way, as there is no central rate-making body. TEX. STAT., REV. CIV. art. 1119-1122, 1124, 1132 (1948).

2. POND, PUBLIC UTILITIES § 270 *et seq.* (4th ed. 1932).

3. *E.g.,* Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951); Davisworth v. City of Lexington, 311 Ky. 606, 224 S.W.2d 649 (1949); Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911). See 4 A.L.R.2d 596 (1949) (cases collected). Apparently the only case holding that a municipality may not charge higher rates to non-residents is City of Montgomery v. Greene, 180 Ala. 322, 60 So. 900 (1913).

porations lies in the purposes for which they are established and the essential duty of each. A privately owned utility is franchised by the state to serve as much of the public at large as is economically feasible without particular regard to political boundary, but a municipal corporation is established for the benefit of, and owes its primary duty to, its own citizenry.[4] Non-residents have no lawful claim upon any city service.[5] The public interest in a privately owned utility requires that all of the utility's acts be reasonable and non-discriminatory. This is also true of a municipal corporation "in so far as it is performing a function for its inhabitants who constitute its limited public to whom its duties are owed." [6] A privately owned utility can best serve its consumers through uniform rates to all similarly located, while a municipally owned utility can best serve its inhabitants by decreasing their burden through extraterritorial sale of services at higher rates.[7] It has, in fact, been held an *obligation* of a city to sell its surplus water at the highest price obtainable for the sole benefit of the city.[8] Where states have given a municipality the statutory right to make extraterritorial sales at the discretion of the municipality and under its own terms,[9] courts have usually interpreted the statutes as allowing municipalities to charge higher rates to non-residents.[10] In the instant case, however, a similar statute was not so construed.[11]

Municipal ownership of a utility generates a conflict between economic and political considerations. The problem is common, since many cities sell utility service to non-residents and most of these do so at higher rates.[12] All the economic factors, such as the public need for the service, limited supply of a natural resource and wasteful duplication of facilities, which impose on a privately owned utility the duty of providing non-discriminatory and reasonable rates to all consumers,[13] recommend that the fact of city

4. Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911).

5. Davisworth v. City of Lexington, 311 Ky. 606, 224 S.W.2d 649 (1949). See 4 McQUILLAN, MUNICIPAL CORPORATIONS § 1821 (2d ed. 1943).

6. Davisworth v. City of Lexington, 311 Ky. 606, 611, 224 S.W.2d 649, 652 (1949); *accord,* City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939).

7. See Guth v. City of Staples, 183 Minn. 552, 237 N.W. 411 (1931).

8. Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911).

9. *E.g.,* COLO. STAT. ANN. c. 163, § 22 (1935); S.C. CODE § 7300 (1942).

10. Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951); Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911).

11. A city may sell water to non-residents "under such terms and conditions as may appear to be for the best interests of such town or city." TEX. STAT., REV. CIV. art. 1108 § 3 (1948). After stating that the statute is not sufficient to authorize a discriminatory rate to non-residents, the majority opinion later concludes that the effect of the statute is to allow a city to exact a higher rate from non-residents initially, but that once rates are prescribed, a "rate status" is established which cannot later be changed to the disadvantage of non-residents. Instant case at 624, 627.

12. See Bauer, *City Utilities Serve Neighbors,* 33 NAT. MUNIC. REV. 342 (1944). A related problem arises where adjacent cities which are in different states are serviced by the same utility company. See City of Texarkana v. Arkansas Gas Co., 306 U.S. 188 (1939).

13. POND, *op. cit. supra* note 2, § 271. See generally, TROXEL, ECONOMICS OF PUBLIC UTILITIES c. 29, 30 (1947).

ownership should not alter this basic utility obligation. The court in the instant case apparently felt these economic considerations to be controlling. However, other factors, more political in nature, are worthy of consideration. A city's purchase of a utility plant is made on behalf of its citizens, who then become both consumers and owners. The requirement of serving non-residents at the same rates as residents partly defeats the purpose of the purchase by decreasing the benefit derived from the resident consumers' ownership.[14] Utility service is only one phase of a prevalent situation in which non-residents adjacent to cities enjoy the economic and other advantages of city life without being subjected to all the responsibilities of citizens. Thus in many instances cities serve fringe areas at the expense of the municipal taxpayers. The obvious solution to the problem is annexation of these fringe areas; the lever of higher utility rates might serve as a means of persuading non-residents to favor annexation.[15] In the meantime higher rates would relieve to some extent the burden on city residents incurred in supporting adjacent non-residents in other ways.

To resolve both the economic and political considerations many states have made the extraterritorial sale of municipal utility service subject to rate regulation by the state public utilities commission.[16] Thus the non-residents are afforded protection against exorbitant rates, and the cities are allowed a fair profit from sales beyond their corporate boundaries.[17] Where, as in Texas, there is no utilities commission, the courts can achieve the same desirable result by setting aside unreasonable rates to the non-residents.[18] Such a course would avoid the undesirable rigidity of the present decision.

14. See Kneier, *State Supervision Over Municipally Owned Utilities,* 49 COL. L. REV. 180, 196 (1949).

15. See Tableman, GOVERNMENTAL ORGANIZATION IN METROPOLITAN AREAS (1951).

16. This has been done in nineteen states. "The strongest case for state control of municipal utilities can be made where service is furnished beyond the corporate limits." Kneier, *supra* note 14, at 193.

17. As an example, Pennsylvania municipal corporations when supplying water outside the city are subject to the jurisdiction of the Public Utility Commission. PA. STAT. ANN. tit. 66, § 1141 (Purdon 1941). The Pennsylvania Superior Court has held that the commission must allow a municipal water company to discriminate between residents and non-residents to the extent that the corporation may charge rates to non-residents which would return a fair profit, while charging less profitable rates to its own residents. Ambridge Borough v. Pennsylvania Public Utility Commission, 137 Pa. Super. 50, 8 A.2d 429 (1939).

18. *E.g.,* Kiefer v. Idaho Falls, 49 Idaho 458, 289 Pac. 81 (1930); Springfield Gas and Electric Co. v. Springfield, 292 Ill. 236, 126 N.E. 739 (1920); Barnes Laundry v. Pittsburgh, 266 Pa. 24, 109 Atl. 535 (1920).